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NO. 93-1168

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

RONNIE WAYNE OWEN,
Petitioner

VS.

CHEVRON U.S.A. INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT, CHEVRON U.S.A. INC.

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QUESTION RESTATED

Should this Court review the Fifth Circuit's determination, uncontradicted by any United States Circuit Court's decision, or this Court, that the fifty-six year old "borrowed employee" doctrine survived and was unaffected by the 1984 amendments to 33 U.S.C. 904(a) and 905(a) of the Longshore and Harbor Workers' Compensation Act?

PARTIES TO THESE PROCEEDINGS

The parties to these proceedings are petitioner, Ronnie Wayne Owen, and respondent, Chevron U.S.A. Inc.

Rule 29.1 Listing of Parent Company and Non-Wholly Owned Subsidiaries of Chevron U.S.A. Inc.

Parent

Chevron Corporation

Non-Wholly Owned Subsidiaries

Chevron Capitol U.S.A. Inc.

Chevron Oil Finance Company

Felix Oil Company

Kewanee Industries, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO. 93-1168

RONNIE WAYNE OWEN,
Petitioner

VS.

CHEVRON U.S.A. INC.,
Respondent

OPPOSITION BRIEF OF RESPONDENT, CHEVRON U.S.A. INC.

Respondent, Chevron U.S.A. Inc., respectfully prays that this Court decline to grant the writ of certiorari sought by petitioner to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on October 19, 1993. This court has denied review of the identical issue raised by petitioner's writ application on four prior occasions, as recently as 1991.

OPINIONS BELOW

The unpublished opinion of the Fifth Circuit Court of Appeals and the opinion of the district court on Chevron U.S.A. Inc.'s Motion for Summary Judgment, as well as the district court's judgment, comprise the appendix to

petitioner's brief.

STATUTES INVOLVED

The statutes involved are 33 U.S.C. 904(a) and 905(a):

§904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of conpensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

§905. Exclusiveness of liability

(a Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an

> employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed that risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

STATEMENT OF THE CASE

Ronnie Wayne Owen, petitioner, brought this personal injury suit in state court, Harris County, Texas. Following removal by Chevron to the District Court for the Southern District of Texas, Houston Division, the case was transferred to the Eastern District of Louisiana. Jurisdiction was based upon the jurisdictional grant contained in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, as well as the federal question jurisdiction of this Court, 28 U.S.C. 1331.

Mr. Owen was a temporary laborer nominally employed by Horton Wireline Service, Inc. ("Horton"), a business which provides wireline workers to oil companies

in need of them. Mr. Owen was assigned to work for Chevron U.S.A. Inc. on its West Delta 30-E oil and gas production platform[1] located on the Outer Continental Shelf, off the coast of Louisiana. He claimed that during the course of his employment with Chevron, on April 28, 1991, he suffered personal injuries, and filed the instant lawsuit to recover damages therefor. Because Mr. Owen was performing his work on the Outer Continental Shelf, he received benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA).[2]

The District Court granted Chevron's Motion for Summary Judgment on the grounds that Mr. Owen was a borrowed employee of Chevron whose exclusive remedy against Chevron was compensation pursuant to the LHWCA, and thus, Mr. Owen was barred from any tort recovery as against Chevron. The United States Court of Appeals for the Fifth Circuit, following its settled jurisprudence, affirmed the District Court's judgment.

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[1] Petitioner has called the platform both a "platform" and a "rig." Petition for a Writ of Certiorari pp. 4-5. Because platforms and rigs are not the same, and the distinctions between them are in some instances important, Chevron notes that the West Delta 30-E platform is a platform, not a rig.

[2] Petitioner's Statement of the Case asserts that Chevron was "acting as a contractor." Petition for a Writ of Certiorari p. 4. Chevron does not acquiesce in this completely unsupported allegation as to its legal status under the LHWCA. No doubt this statement was made in order that the cases discussing the liability of contractors would appear to be relevant to the question presented here. However, Chevron's status as a contractor, as asserted by petitioner, has no relevance to Chevron's status as a borrowing employer. This misstatement is simply noted in order that Chevron will not be deemed to have waived its rights to contest it should that become necessary. Sup.Ct. R. 15.1.

SUMMARY OF THE ARGUMENT

The 1984 revisions to the Longshore and Harbor Workers' Compensation Act did not abrogate the tort immunity accorded borrowing employers under Section 905(a). A borrowing employer is an employer under the act because the borrowing employer is in fact the employee's employer. This relationship results from settled common law principles and not by reason of the borrowing employer being statutorily bound as a secondary guarantor of benefits under the LHWCA. The 1984 revisions simply overruled this court's decision in *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984) holding that contractors were entitled to immunity under 905(a) simply by reason of the fact that under 33 U.S.C. 904(a) they were secondarily liable for benefits under the LHWCA, irrespective of whether benefits were actually paid by the nominal employer.

REASONS FOR DENYING WRIT

The petition fails to state any reason for granting certiorari. Petitioners have shown no conflict among the decisions of the circuit courts, no conflict within the decisions of this Court, no important question of federal law, and certainly no unusual departure from the normal course of judicial proceedings. Sup.Ct. R. 10. Further, there is absolutely no conflict in the decisions of the Fifth Circuit or any other circuit regarding the continued vitality of the borrowed servant defense. See *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 783, 112 L.Ed.2d 846 (1991); *Billizon v. Conoco, Inc.*, 993 F.2d 104 (5th Cir.), *rehearing*

en banc denied, 3 F.3d 441 (5th Cir. 1993); *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988); *Alexander v. Chevron, U.S.A.*, 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987); *CAPPS v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 883, 93 L.Ed.2d 83, 107 S.Ct. 141 (1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986); *West v. Kerr-McGee Corporation*, 765 F.2d 526 (5th Cir. 1985).

Petitioners ask this Court to interpret 33 U.S.C. 905(a) of the LHWCA in such a fashion as to abrogate the "borrowed servant/borrowed employee" defense. Petitioners ask this Court to ignore its own prior opinions regarding the common law meaning of "employer," the legislative history of the 1984 amendments to 905(a) and likewise to forget the fact that this Court has consistently denied petitions for writ of certiorari on the identical issue.[3] Petitioner's application raises no important question of federal law and is contrary to the established rules of statutory construction.

I. THE FIFTH CIRCUIT CORRECTLY FOLLOWED SETTLED JURISPRUDENCE

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[3] Writs on this issue were denied in *Alexander v. Chevron, U.S.A.*, 806 F.2d 526, *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed. 735 (1987); *CAPPS v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986), *cert. denied, 479 U.S. 838, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986); and Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3rd. Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 783, 112 L.Ed.2d 846 (1991).

ESTABLISHING UNEQUIVOCALLY THAT THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1984 DID NOT ABOLISH THE BORROWED SERVANT DEFENSE

The borrowed servant defense arises in cases where a defendant who is not a plaintiff's nominal employer shows that in fact the plaintiff is acting as the defendant's employee, and therefore the employee's exclusive remedy against the defendant is for compensation benefits under the LHWCA 33 U.S.C. §901 *et seq.*[4] This defense, which arises from the reverse application of the doctrine of respondent superior, has been thoroughly ingrained in the jurisprudence both prior to, and following the LHWCA 1984 Amendments. *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *Champagne v. Penrod Drilling Co.*, 341 F.Supp. 1282 (W.D.La. 1971), *aff'd* 459 F.2d 1042 (5th Cir. 1972); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed. 2d 414 (1978); *Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981); *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986), *cert. denied*, 479 U.S. 883, 107 S.Ct., 272, 93 L.Ed.2d 249 (1986); *CAPPS v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); *Alexander v. Chevron U.S.A.* 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483

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[4] 33 U.S.C. 905(a) before 1984 read in pertinent part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee.

U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 783, 112 L.Ed.2d 846 (1991); *Billizon v. Conoco, Inc.*, 993 F.2d 104 (5th Cir.), *rehearing en banc denied*, 3 F.3d 441 (5th Cir. 1993).

Following the 1984 amendments to the LHWCA, Pub.L. No. 98-426, 98 Stat. 1639 (1984), 33 U.S.C. 904(a) and 905(a) read as follows:

> 904(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.
>
> 905(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

The word employer in both 904 and 905 has been interpreted to include not only direct employers, but also bor-

rowing employers who exercise such control over the actions of another's nominal employees that those employees are in fact acting as the former's employees. Because there is in fact an employment relationship between the borrowing employer and borrowed employee, all of the legal effects flow from the relationship, including, for example, borrowing employer liability for the torts the employee might commit within the scope of his employment. One of those legal effects is the tort immunity set forth in 33 U.S.C. 905(a).[5] *E.g., Ruiz v. Shell Oil Company,* 413 F.2d 310 (5th Cir. 1969); *Raymond v. I/S Caribia,* 626 F.2d 203 (1st Cir. 1980); *Huff v. Marine Tank Testing Corp.,* 631 F.2d 1140 (4th Cir. 1980); *Hebron v. Union Oil Co. of California,* 634 F.2d 245 (5th Cir. 1981); *West v. Kerr-McGee Corp.,* 765 F.2d 526 (5th Cir. 1985); *Doucet v. Gulf Oil Corp.,* 783 F.2d 518 (5th Cir. 1986); *CAPPS v. N. L. Bariod-NL Industries, Inc.,* 784 F.2d 615 (5th Cir. 1986), *cert. denied,* 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); Alexander v. Chevron, U.S.A., 806 F.2d 526, *cert. denied,* 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987).

The rationale for the borrowed servant doctrine is contained in the seminal case of *Standard Oil Co. v. Anderson,* 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909), where an injured longshoreman sought recovery in tort from a winch operator to whom his nominal employer had assigned him to work.

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[5] The borrowing employer is not "deemed" an "employer" because it has paid compensation to the employee or because it is bound as a guarantor of the benefits. Rather, it is in fact an employer because factually an employment relationship exists between the borrowing employer and the employee.

The question presented was whether the winch operator was in fact the borrowed servant of a borrowing employer thereby abrogating any tort liability in the winch operator's nominal employer as a result of the winch operator's actions. In discussing the test for borrowed servant status and the legal effects thereof, the Supreme Court stated:

> One may be in the general service of another, and nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescene, to the service of a third person, *so that he becomes the servant of that person, with all the legal consequences of the new relation.*

212 U.S. at 220, 29 S.Ct. at 253, 53 L.Ed at 483 (Emphasis added).

The borrowed servant doctrine has been ingrained in the jurisprudence of this Court. *Standard Oil; Kelley v. Southern Pac. Co.*, 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed. 2d 498 (1974); *Baker v. Texas and Pacific Railway Co.*, 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed.2d 756 (1959). Petitioner has cited no cases which are in conflict with this jurisprudence or even discuss or question the continued vitality of the borrowed servant doctrine.[6] Rather, he asks the Court to

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[6] Petitioner points to language in the contract between Chevron and Horton which expresses an intent that an independant contractor relationship would be created. Petition for Writ of Certiorari pp. 5-6. The court below properly held that the language in the contract could not prevent the existence of the legal relationship which arose from the facts

find that the 1984 amendments to 33 U.S.C. 904(a) and 905(a) were meant to legislatively eliminate the borrowed employee doctrine and defense. The basis for this novel suggestion is the last sentence contained in 905(a), added by Pub. L. 98-426, 98 Stat. 1639 (1984):

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employee only if the subcontractor fails to secure the payment of compensation as required by § 904 of this title.

Petitioner's argument had been squarely rejected by the Fifth Circuit below in this case and by four other panels of the Fifth Circuit in *West, Doucet, Capps,* and *Alexander.* It has also been squarely rejected by the Third Circuit in *Peter.* This Court, by denying a petition for writ of certiorari in *Capps, Alexander, Doucet,* and *Peter,* squarely refused to question the Fifth and Third Circuits' resolution of this issue.[7]

Petitioner's argument is not supported by the language of the amendment, which is directed solely at contractors (and not borrowing employers) and is contradicted

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(footnote 6 continued)

of the situation. It is a general rule of law that what a contract is styled by the parties does not determine its character or their relationship, or the rights of strangers against the contracting parties. *Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co.,* 163 U.S. 564, 582, 16 S.Ct. 1173, 1180, 41 L.Ed. 265, 271 (1895); *Hervey v. The Rhode Island Locomotive Works,* 93 U.S. 664, 3 Otto. 664, 23 L.Ed. 1003 (1876); *Heryford v. Davis,* 102 U.S. 235, 12 Otto. 235, 26 L.Ed. 160 (1880).

[7] The *Peter* writ denial was in 1991.

by the legislative history of the amendment. Petitioner fails to comprehend the distinction between the immunity accorded "borrowing employers" and the immunity previously accorded contractors who subcontracted their work and thereby were statutorily bound under 33 U.S.C. 904 to guarantee the payment of compensation to employees of their subcontractors. The language of the amendment clearly addresses itself only to the latter situation.

A defendant/employer who is not the direct employer can have compensation exposure and the reciprocal immunity from tort liability under either of two separate circumstances. First, a defendant can establish that the plaintiff was in fact acting as the defendant's employee, and was thus a borrowed employee. Second, a general contractor can assert immunity from tort suit by the employee of a subcontractor "not because the plaintiff was a "borrowed" or *de facto* employee of the general contractor, but because of the general contractors' obligation under the pre-1984 LHWCA to guarantee the payment of compensation to subcontractor's employees. *See* 33 U.S.C. 904(a) (1976)." 765 F.2d at 529.

In the first instance, "borrowing employer" status is the same as employer status because a "borrowing employer" is in fact an employer. This result follows from the traditional interpretation of "employer." In *CCNV v. Reid*, 490 U.S. 730, 739-740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), this Court noted:

> In the past, when Congress has used the term "employee" without defining it, we have conclud-

ed that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.[8]

Congress has not defined the term employer in the LHWCA. Rather, it has denominated a subset of "employers" as "employers" for purposes of the act. 33 U.S.C. §902(4) (the term employer means an *employer* ...(Emphasis added)). 43 U.S.C. §1333(b), which makes the LHWCA applicable to injuries occurring on the Outer Continental Shelf, also defines employer as "employer means any *employer* ... "(emphasis added). The common law concept of employer, then, controls the determination of who is an employer for purposes of §905(a). These common law principles are exactly what a court employs to determine that a person or company is a "borrowing employer." In fact, the cases cited by the Court in *Reid* as incorporating "the conventional master-servant relationship as understood by common-law agency doctrine" are borrowed employee cases. *Kelley v. Southern Pac. Co.*, 419 U.S. 319, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed.2d 756 (1959); *Robinson v. Baltimore & O.R. Co.*, 237 U.S. 84, 35 S.Ct. 491, 59 L.Ed. 849 (1915). Thus, it is beyond question that a "borrowing employer" is in fact an employer as that term is ordinarily understood.

That a "borrowing employer" is in fact an employer for purposes of the LHWCA was noted by the Third Circuit

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[8] Of course, a determination that a person is an "employee" of a company conversely carries with it the determination that the company is the "employer."

in *Peter*. "Thus, Professor Larson indicates that '[t]heoretically, the process of determining whether the [borrowing] employer is liable for compensation consists of simply applying the basic tests of employment . . . .' 1C A. Larson, Workmen's Compensation Law § 48.13 at 8-414 (1989)." 903 F.2d at 941 n. 6.

In *Washington Metro, Area Transit Auth. v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984), *reh. denied*, 468 U.S. 1226, 105 S.Ct. 26, 82 L.Ed.2d 919 (1985) ("WMATA"), this Court recognized that, in the second situation only (statutory guarantor), the majority position of the federal courts was that a contractor had no immunity unless the subcontractor failed to secure compensation and the general contractor was forced to pay it. 467 U.S. at 937, 104 S.Ct. at 2834, 81 L.Ed. 2d at 779. *WMATA* overturned that majority position, holding that general contractors were entitled to immunity from tort liability unless they failed to meet their statutory obligation under §904(a) to secure compensation. 467 U.S. at 939-940, 104 S.Ct. at 2835, 81 L.Ed. 2d at 781. *WMATA* did not in anyway address or discuss immunity as a borrowing employer, or a borrowing employer's status as an employer for compensation purposes.

The amendment to §905(a) upon which petitioner relies was enacted three months following the *WMATA* decision. The report of the Conference Committee unambiguously declares that *WMATA:*

> '[C]hanged key components of what had widely been regarded as the proper rules governing contractor and subcontractor

> liability under the [LHWCA] . . . WMATA, the conferees believe, does not comport with the legislative intent of the act, nor its interpretation from 1927 through 1983. The case should not have any precedential effect.'
>
> H.R. Conf. Rep. No. 98-1027, 98 Cong., 2nd Session 24, Reprinted in 1984 U.S. Code Cong. and Admin. News 2734, 2771, 2774.

The Committee Comments make no reference to the compensation exposure and corresponding immunity accorded to employers pursuant to the borrowed employee doctrine. The express intent of the legislature was to overrule WMATA as an unwanted deviation from 56 years of precedent. As the Fifth Circuit recognized, in *West*, the years of precedent include the borrowed employee doctrine as well as the general-contractor rule rejected by WMATA. The Committee Comments show that Congress intended to do no more than restore the understanding that existed prior to WMATA, including the borrowed servant doctrine.

In holding that the 1984 amendments did not abrogate the borrowed servant defense, the *West* court stated:

> *The legislative history of the 1984 amendments unambiguously demonstates that Congress's sole purpose in amending* §904(a) *was to overrule WMATA, and not to amend the borrowed-servant doctrine or otherwise modify LHWCA law.* The report of the Conference Committee that added the §904(a) and §905(a) amendments states

that *WMATA* "changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability under the [LHWCA]," and recites that the amendments "disapprov[e]" *WMATA*. After describing the amendments, the report concludes:

> *WMATA, the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. The case should not have any precedential effect.*

H.R. Conf. Rep. No. 98-1027, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2771, 2774.

The narrow Congressional focus on reversing *WMATA* is underscored by the Conference Committee's beginning and ending sentences. Congress characterized *WMATA* as an unwanted deviation from 56 years of precedent. That precedent include the borrowed-employee doctrine, *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), as well as the general-contractor rule rejected by *WMATA*, *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967). Indeed, this court has explicitly recognized that *Probst*, whose rule is codified in the 1984 amendments, does not foreclose the possibility that a general contractor may be an employer under the borrowed-servant doctrine. *Champagne v. Penrod Drilling Co.*, 462 F.2d 1372 (5th Cir. 1972), *cert. denied*, 409 U.S. 1113, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973). The committee language shows that Congress intented to do no more than restore the understanding that existed at the time of *Ruiz*, *Probst*, and

> *Champagne. We conclude that the 1984 amendments have no bearing on the borrowed-employee issue before us.*

765 F.2d at p. 530 (Emphasis added).

In *Doucet,* the Fifth Circuit once again rejected the argument that the LHWCA amendments abrogated the borrowed servant defense, holding:

> We hold that an oil company subject to the Longshoremen's and Harbor Workers' Compensation Act may invoke the borrowed-employee doctrine in defense of a tort claim by a worker nominally employed by a labor-services contractor.

783 F.2d at p. 520.

In *Doucet,* the argument was again advanced that under the amended provision of 33 U.S.C. 905(a), the borrowed servant defense had been eliminated and the only way an oil company could avail itself of the tort immunity set forth in this provision was if the oil company was actually called upon to make compensation payments to the injured employee in accordance with 33 U.S.C. 904(a). In rejecting the argument, the Court stated:

> This circuit has consistently held that, if an oil company assumes so much control over the activities of a person who is nominally the employee of the company's subcontractor as to make that person in effect its borrowed employee, the com-

pany is shielded by the exclusivity of the compensation remedy from tort liability. *This was not based on a specific provision of the Compensation Act but stemmed from a reverse application of the respondeat superior rule, the rule that an employer is responsible not only for the acts of those persons on his payroll but for the acts of those over whom he has such control that they are in effect his borrowed servants. Thus a rule designed to impose tort liability on a person in control of an employee, albeit a borrowed one, became a defense against tort liability to the controlled employee.*

The 1984 amendments did not abolish this defense by implication. Congress' purpose in amending the Act was to overrule the Supreme Court's decision in *Washington Metropolitan Area Transit Authority v. Johnson.* For reasons we have recently fully discussed in *West v. Kerr-McGee Corp.*, we held:

> The legislative history of the 1984 amendments unambiguously demonstrates that Congress's *sole* purpose in amending §904(a) and §905(a) was to overrule *WMATA*, and not to amend the borrowed-servant doctrine or otherwise modify LHWCA law.

783 F.2d at 522 (Emphasis added).

This argument, since *West* and *Doucet*, has been repeatedly rejected by the Fifth Circuit. *CAPPS*, 784 F.2d at p. 619; *Alexander*, 806 F.2d at p. 529; *Melancon*, 834

F.2d at pp. 1246-1247; and by the Third Circuit in *Peter*, 903 F.2d at pp. 938-941, just as it was in the instant case.[9]

The availability of the borrowed servant defense to a borrowing employer does not arise out of the fact that the borrowing employer has in fact made compensation payments to an injured worker in accordance with 33 U.S.C. 905(a). Rather, the defense arises out of the nature of the work relationship between the borrowing employer and the worker, the fact that the worker is acting as the employee of the borrowing employer, and the fact that: (1) the borrowing employer would be responsible to a third party for the tortious behavior of the worker; and (2) by virtue of the existence of an employment relationship the

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[9] Petitioner argues that "Congress could hardly be expected to take notice of a circuit-court created rule only in application in a few circuits." Petition for a Writ of Certiorari, p. 26. The *Peter* court obviously felt differently. Rather than make an unsupported statement about the meaning of Congress' omission of reference to the *Ruiz* line of cases as has petitioner, the court supported its interpretation with specific references.

> [T]hat brief history does not support the proposition that Congress wished to upset the use of the borrowed servant doctrine as utilized by the Fourth and Fifth Circuit cases; *this is an omission of some significance in light of the care taken in the legislative history to identify cases that Congress did intend to overturn.* H.R.Rep. No. 98-570, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Admin.News 2740 (indicating rejection of *McDermott v. Boudreaux*, 679 F.2d 452 (5th Cir. 1982)); 130 Cong.Rec.H2488 (daily ed. April 9, 1984) (Explanation of House Amendment to S. 38, the Longshoremen's and Harbor Workers Act Amendments of 1983) (indicating intent to overrule Melson v. United Brands Corporation, 594 F.2d 1068 (5th Cir. 1979)). (Emphasis added).
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> 903 F.2d at 941

borrowing employer has potential LHWCA compensation liability to the employee.

This defense was neither addressed in, nor precluded by, the LHWCA amendments. The purpose of the LHWCA amendments was to legislatively overrule the Supreme Court's limited holding in *WMATA v. Johnson;* it did not affect the continued vitality of the borrowed servant defense!

Petitioner's argument to the contrary ignores the initial finding by the *WMATA* court upon which the rest of the decision was based. "Section 5(a) speaks in terms of 'an employer' and, at least as far as the employees of subcontractors are concerned, *a general contractor does not act as an employer.*" *Washington Metro. Transit Auth. v. Johnson,* 467 U.S. at 933, 104 S.Ct. at 2832, 81 L.Ed.2d at 776 (Emphasis added). Thus, *WMATA* held that someone who was not an employer under ordinary principles of common law was an employer for purposes of the LHWCA simply as a result of the statutory obligation to guarantee compensation payments. It was this expansive reading of the term employer which Congress overruled in 1984.

In the instant case, Chevron has been granted immunity, not by an expansive reading of the term employer within the LHWCA, but rather because under settled common law principles as set forth by this Court, the term employer includes "borrowing employers" like Chevron.

II. THE FIFTH CIRCUIT'S OPINION IS IN COMPLETE ACCORD WITH THE PRIOR DECISIONS OF THIS COURT AND THE U. S. COURT OF APPEAL

There is no decision of any court in conflict with the Fifth Circuit's determination in the instant case that the borrowed employee doctrine survived and was unaffected by the 1984 amendments to the LHWCA. In fact, all the courts considering the issue have concluded that this is a correct statement of the law. *West*, 765 F.2d 526; *Doucet*, 783 F.2d 518; *Capps*, 784 F.2d 615; *Alexander*, 806 F.2d 526; and *Peter*, 903 F.2d 935.[10]

The Fifth Circuit's construction of 33 U.S.C. 905(a) as amended by the 1984 amendments is in complete accord with the decisions of this Court regarding statutory interpretation. The sole purpose of the amendment of 33 U.S.C. 905(a) was to abrogate the statutory-guarantor defense of *WMATA;* it did not in anyway have as its purposes the abrogation of the borrowed servant doctrine. The legislative history of the amendments, referenced above, makes this abundantly clear. It is absolutely proper that a Court construing a statute review the legislative history to ascertain its meaning.[11]

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[10] Petitioner places great weight on his perception that the panels of the Fifth Circuit which came after *West* disagreed with its holding. However, the Fifth Circuit has refused en banc consideration of this issue with not one judge in active service even requesting that the court be polled to determine if the case should be heard *en banc. Billizon v. Conoco*, 993 F.2d 104, (5th Cir.), *rehearing en banc denied*, 3 F.2d 441 (5th Cir. 1993).

[11] Petitioner urges that the legislative history should be ignored and cites numerous cases for the proposition that the interpretation of a

In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), this Court held that to the extent the court of appeals rejected reference to the Federal Water Pollution Control Act's legislative history in discerning the meaning of the statute, the court was in error, for "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " 426 U.S. at 10, 96 S.Ct. at 1942, 48 L.Ed.2d at 441. Similarly, in *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed.2d 420 (1984) this Court expressly recognized that when dealing with complex statutes, the true meaning of a single section of the statute, however precise its language, cannot be ascertained if considered apart from related sections or isolated from the history of the legislation of which it is an intergral part.

As this Court stated in *Watt v. Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981):

> "[T]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J., concurring). See *Rubin v. United States*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). But ascertainment of the meaning apparent on the face of a single statute need not

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(footnote 11 continued)
statute must be ascertained from the language of the statute only. However, in four of the six cases directly cited, this court fully reviewed and analyzed the legislative history.

> end the inquiry. *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976); *United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940). This is because of the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' *Boston Sand Co. v. United States,* 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928) (Holmes, J.). *The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect. E.g., Church of the Holy Trinity v. United States,* 143 U.S. 457, 459, 36 L.Ed. 226 (1892); *United States v. Ryan,* 284 U.S. 167, 175, 52 S.Ct. 65, 68, 76 L.Ed. 224 (1931).

451 U.S. at 265-266, 101 S.Ct. at 1677-1678, 68 L.Ed. 2d at 88 (Emphasis added).

In any event, "common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it." *Wisconsin Public Intervenor v. Mortier,* 111 S.Ct. 2476, 2485, n.4, 115 L.Ed.2d 532, (1991).

The legislative history shows without question that the sole purpose of the 1984 amendment to 33 U.S.C. 904(a) and 905(a) was to legislatively overrule *WMATA,* and nothing else. It did not in anyway abrogate, address or effect the borrowed servant defense.

Petitioners' argument that the 1984 amendments to 33 U.S.C. 904(a) and 905(a) abrogated the borrowed servant defense ignores this Court's decision in *WMATA*, this court's common law holdings on the existence and effects of a borrowing employer relationship, as well as the legislative history of the 1984 amendments. Petitioners' argument is obviously flawed and not worthy of review by this Court. Review of the identical argument has been refused by this Court numerous times. *CAPPS v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); *Alexander v. Chevron, U.S.A.*, 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir. 1986), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986); *Peter v. Hess Virgin Islands Oil Corp.*, 903 F.2d 935 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 783, 112 L.Ed.2d 846 (1991).

CONCLUSION

Petitioner seeks a writ of certiorari to review the determination by the Fifth Circuit below that the 1984 amendments to the LHWCA, particularly 33 U.S.C. 904(a) and 905(a) did not affect the continued vitality and existence of the borrowed employer defense; a conclusion that the Third Circuit has likewise reached. A cursory review of the statutes' language and legislative history confirms that the Fifth Circuit's decision below was the correct one. Moreover, all the courts which have considered the issue, have reached the identical conclusion. There is no conflict within the Fifth Circuit or within any other circuit with respect to the issue before the Court.

Respondent respectfully urges that this Court deny the writ of certiorari requested to review the decision of the Fifth Circuit Court of Appeals entered in this case on October 19, 1993.

Respectfully submitted,

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